UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
CHARLES R. BREYER, JUDGE

UNITED STATES OF AMERICA,)
)
Plaintiff,)
v.)
) NO. CR 01-0435 CRB
REGINALD AKINS,)
)
Defendant.)
)

San Francisco, California
Wednesday, February 1, 2006

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Belle Ball, RMR, CRR, CSR #8785

WEDNESDAY, FEBRUARY 1, 2006

THE CLERK: Calling 01-0435, the United States of America versus Reginald Akins. Appearances, Counsel?

MS. BADGER: Good afternoon, Your Honor. Susan Badger for the United States.

MS. MOORMAN: Good afternoon, Your Honor. Ann Moorman on behalf of Mr. Akins. Present, he is in custody.

I just need a moment to speak with him, if I may.

THE COURT: Yeah.

(Off-the-Record discussion between Defendant and Counsel)

THE COURT: Let the Record show the parties are present. This matter is on, I guess, on -- it has been sent back to me --

MS. BADGER: Yes.

THE COURT: -- for consideration. It is a post-appeal sentence.

MS. BADGER: Yes, Your Honor. It was remanded by the Ninth Circuit for the purpose of determining whether --

THE COURT: The sentence was appropriate.

MS. BADGER: -- the sentence would be materially different under Booker.

THE COURT: Well, you know, I'll tell you what I'm inclined to do. What I'm -- what I'm inclined to do is to sentence the Defendant to a total of 360 months, as distinct

from 384 months. In other words, run the -- the 60-month on Count 3 consecutive to the 25-year sentence, as distinct from -- I don't know what I did the last time, but I think that that was the objection, the last time I ran it, what, consecutive to --

MS. BADGER: Well, it sounds like the Court -- the last time, Your Honor, you sentenced Mr. Akins on the first bank robbery to one day, on the second bank robbery to one day, and the felon in possession count to one day.

And then, the first 924(c), the Court made a finding that Mr. Akins brandished the firearm, and imposed the mandatory minimum sentence of 84 months or seven years. And then, on the second 924(c), imposed mandatory minimum of 25 years, and ran them consecutive.

THE COURT: So in other words, the issue is -- and Ms. Moorman points it out -- is that the jury didn't find a brandishing, I found the brandishing, based upon the evidence that I heard.

But it's her objection that this should have been a jury determination, and if it had been, since it hadn't been, I should not impose -- I shouldn't impose the brandishing part of it. That's the point, isn't it?

MS. MOORMAN: Yes.

THE COURT: Yeah. So, you know, normally, one would say a 24-month difference is a big difference. In this case, obviously it is not a big difference, except I'm sure it is a

difference to the Defendant. You know, realistically, it is a 20-month difference. What ultimately happens to the Defendant, I don't know.

But I think that there is something to be said for giving him a sentence that doesn't include the brandishing. Even though I saw evidence of brandishing, it was not a jury determination. And so, I -- I think he is entitled to resentencing.

Is it material? Well, it is to him.

MS. BADGER: Well --

THE COURT: It is hard to look at something and say, well, 24 months, two years is not material. But in the larger picture, arguably it is not, but I think he is entitled to what I consider to be a correct sentence, a legally correct sentence. I know the Government takes -- the Government has well stated their position.

Normally I might agree with all those positions, but because of the sentence, because of the -- what is being imposed here, and by virtue of the fact that I don't -- I'm not viewing this case as precedential in any of the other cases that I deal with, it is just overall what is a reasonable sentence in order to accomplish the goals, I think a 360-month sentence as distinct from a 384-month sentence is more reasonable.

Maybe --

MS. BADGER: Well, the Court made a finding that by a

preponderance of the evidence, based on what the Court heard at trial, that --

THE COURT: Right, I'm vacating that finding. Or I'll leave the finding as it is, but if I just leave the finding as it is and say in light of Booker, the Court believes that -- and not wanting to assert a sentence that is more than is absolutely necessary, that I believe the 360 months is appropriate.

Now, is that legally erroneous?

MS. BADGER: I think --

MS. MOORMAN: Well, I think -- excuse me.

THE COURT: Everybody seems to be shaking that their head that I shouldn't do this.

MS. BADGER: Well, I think it is legally erroneous under Harris, Your Honor, which is directly on point. And as the Ninth Circuit found in Dare, is controlling under these circumstances. Harris was not overruled by Booker or Blakely or --

THE COURT: But it could be. I mean, the problem is, is it -- you know, I don't think -- well, yeah, maybe I could

MS. MOORMAN: Can I just briefly be heard on this very precise subject?

THE COURT: You can take all the time. Because maybe what ultimately might happen that is Mr. Atkins (sic) will come back again, over something that isn't going to make, really, any difference in his life and law enforcement's life, in anybody's

life, back and forth and back and forth. To what end? 360 months. Where I come from, that's 30 years.

How old are you, Mr. Atkins?

THE DEFENDANT: Thirty-five now.

THE COURT: Really. Does anybody care? I mean, this is -- basically he's been given a life sentence. Maybe he can -- something that could happen over a period of time that will give him some -- down the road, something can happen that would get him out. I don't know.

But I don't know that we ought to spend hours debating what kind of life sentence he's going to get. There must be some way just to do this, and not be concerned about it for the future. I said that it had no precedential value. But if you are going to appeal it, then of course I have to -- I have to go through this whole process.

MS. MOORMAN: Harris doesn't --

THE COURT: Harris. Was it effectively overruled? Now, with the composition of the Court as it is today, do I have to be concerned, you know, what's going to happen, so forth? I understand that can be said in any case in front of me, but -

MS. BADGER: Well, I mean --

THE COURT: I'm just trying to figure out what kind of life sentence we want. What kind of life sentence would you accept without appealing it?

MS. BADGER: Well, I personally can't answer that

question. That's up to the Department, Your Honor. But clearly, you would be in a position or you are in a position of speculating about what the Supreme Court might do the down the road, and in Dare the Ninth Circuit --

THE COURT: I guarantee you the Supreme Court, they would be speculating. I have no idea, and they don't, either, until a case is presented.

MS. BADGER: But in Dare, the Ninth Circuit, they understood that the defendant in that case was inviting the Court to make a finding that there was an inconsistency, and that Harris was overruled, but they expressly declined to take that invitation, and spoke of the precedential value of Harris.

THE COURT: Okay, maybe I have to wait. Maybe I have to wait, and Mr. Atkins can come back here. He will be around, after all, and maybe that's a legally correct policy. I don't actually think it is going to make any difference.

In other words, I simply say it is not going to materially change the sentence until or unless Harris is overruled. And if it is, then it would change it, and then I would resentence Mr. Atkins. I could do that. It makes no difference, really.

MS. MOORMAN: Well, I don't think --

THE COURT: That's my whole point, anyway.

MS. MOORMAN: I don't think you -- I don't think the Court should feel like it is being pushed in a corner of trying

to be clairvoyant about whether or not Harris will be overruled in the near future. I think if you -- what you have been asked to do on remand is to determine in light of Booker whether there would be a material or different -- materially different sentence imposed.

And, so that requires some retrospective visit to the circumstances that were at play when he was initially sentenced.

THE COURT: That is true, but the problem is, is that the answer is actually no. The problem is that there is no real material difference between 36 --

MS. MOORMAN: I think two years is a difference.

THE COURT: Yeah, but between 360 months and -- and 384 months, no. I mean, that's the practical answer, is that there is no material difference.

MS. MOORMAN: I'm not sure that -- then I'm going to disagree on the Court's interpretation of "material."

THE COURT: Okay.

MS. MOORMAN: And I don't know that that -- that word has, you know, been defined in the case law after Ameline goes up twice.

But I think one of the options available to you today, you know, on -- and I am going to ask you to impose a 30-month -- or a 30-year sentence -- is that at the time the Court made the finding that the facts supported brandishing, the case law was not developed as it is today. You did not have the benefit

of Blakely, you did not have the benefit of the Supreme Court's interpretation of Apprendi via Booker, and I think the Court would not have made the finding of brandishing, had you had the benefit of the guidance set down by the Supreme Court in Booker.

You would have, given the weight of the jury's finding as to possession, a more significant weight, and would have refrained from making a finding of brandishing.

THE COURT: Here is the problem, practically speaking, is that as I sit here today, I can't remember with the clarity that I could after a trial, whether and to what extent I was convinced that brandishing had occurred. I mean, obviously I believe brandishing occurred, and I made a finding by the preponderance of the evidence.

Would I have -- would I have made -- and that's a rather interesting thing, anyway, by finding the preponderance of the evidence, because the circuit law at that time was probable that if it was going to be a substantial difference between the sentence that would be imposed with the sentencing factor and without the sentencing factor, I would have to find by clear and convincing evidence.

So, I think I probably thought it's not -- it's not going to make a big difference in the sentence, as I think today it doesn't make a big difference, because two years always is important, but -- but it's not so important between 32 years and -- and 30 years. Its marginal difference is very slight.

It's very slight. So I would not have applied a clear and convincing test.

Now, your argument of course is, under Blakely, basically, it -- it would have been a jury determination, is that right?

MS. MOORMAN: Yes. And I -- and I disagree with the Government's assessment that Blakely only affects guideline sentences. Blakely doesn't just affect guideline sentences.

Yes, the holding in the matter declared the federal sentencing guidelines unconstitutional, and then created a remedy for future sentencings, but the broad reading of the case and the correct reading of the case is that a fact not found by a jury beyond a reasonable doubt or not admitted by the defendant cannot be used to enhance a sentence.

And that's exactly what was done in this case. And so, I think -- it doesn't have, it is not solely read in the context of the federal sentencing guidelines. So -- because it was previously applied, as we know, to the state guidelines from the state of Washington.

I think then you would not have, at the time, given the case law as it exists today, found a brandishing element and sentenced in accordance with it. And so I'm asking you to vacate the finding, and sentence in accordance with the jury's verdict.

THE COURT: Well, when you say "vacate the finding,"

are you saying that I would have to --

MS. MOORMAN: Or you have to find the finding to be moot, with all due respect. It's -- it would not control your sentencing determinations.

THE COURT: In other words I would have to find – I would have to find that it is not a factor that I'm going to consider in setting the sentence.

MS. MOORMAN: Yes.

THE COURT: It's contested. It was contested. And, therefore, I don't have to -- I don't -- do I have to have a hearing on it? Is the Government entitled to a hearing?

MS. BADGER: Well, we had a trial on the matter, Your Honor.

THE COURT: No, you didn't have a trial on whether -- you didn't have a trial on -- we had a trial on all the evidence.

MS. BADGER: Yes.

THE COURT: But the jury made no finding as to the brandishing.

MS. MOORMAN: Yes, it did -- well, it rejected it. There was a special verdict submitted, and they found the Defendant possessed the weapon. And signed the verdict form.

MS. BADGER: I might --

THE COURT: Well, were they given the option?

MS. MOORMAN: Yes.

THE COURT: See, I don't remember this.
MS. MOORMAN: Yes, there's verdict forms.
THE COURT: The verdict forms. And the verdict form had -- there was a verdict form which said brandishing?
MS. MOORMAN: There were special verdicts, one as to the issue of -- on the 924(c) counts, whether the Defendant possessed the firearm or brandished the firearm.
They found, true, the allegation that he possessed the firearm. And therefore, I imagine, disregarded -- did not sign the verdict form regarding brandishing.
MS. BADGER: This was an issue on direct appeal, Your Honor. And it was raised, and the Ninth Circuit held that it affirmed this Court's finding, despite the fact that the jury had --
THE COURT: Oh, okay. Well, there is no disagreement as to the facts. That is, the jury did not find beyond a reasonable doubt that the Defendant brandished the weapon.
MS. MOORMAN: Yes.
THE COURT: So, I found by a preponderance of the evidence, that the Defendant did.
MS. MOORMAN: Yes.
MS. BADGER: Yes, and you put that in your sentencing memoranda. And when I look at the pre-sentence report that recounts the facts elicited at trial, and maybe this would refresh the Court's recollection, the evidence was that the

suspect grabbed one of the bank tellers, who was seven months pregnant at the time, put her in a headlock, pulled out a revolver handgun, and pressed it against her temple. So --

MS. MOORMAN: Which were all findings I objected to at sentencing, the -- putting the teller in the headlock, putting the gun to her temple were all findings that you said you would not consider. And that is in the transcript that I attached in my memorandum.

So we can't go back and now urge you to use findings that at the time, you said you wouldn't consider.

THE COURT: If I said I wouldn't consider it, how did I do it?

MS. MOORMAN: Because I raised factual objections to the presentence report, to exactly that. And you said, "Ms. Moorman, I am not going to rely on the allegations that the teller was in a headlock and a gun was pressed to her temple, in imposing the sentence. So I don't have to rule on your objections."

And you didn't. That was clearly a proper way to dispose to those discrete factual objections to the presentence report, instead, because he had been convicted of armed bank robbery. And the guidelines would have added points to those two allegations.

And you said, "I'm not going to consider those factual allegations, so I'm not going to rule on your objections."

And that has -- frankly, I think now we have digressed far and away from the brandishing issue, because -- the brandishing issue was not decided at the time of sentencing. The Court, at the conclusion of the trial, when the verdicts had been rendered, and accepted them, and discharged the jury, made a finding on the brandishing at a separate time.

And so -- and frankly, Your Honor, I was there, and I don't have a perfect recollection, but my recollection is that you did not make a long statement on the Record of what supported it, except that you noted the distinction between the standards of proof. One being when the verdict form was submitted to the jury, they are controlled by a proof beyond a reasonable doubt standard; they are now, they were then.

They clearly found that he possessed the firearm, according to proof beyond a reasonable doubt; you noted when you made the finding of brandishing, that you weren't bound by that standard.

Now, on direct appeal, the issue was taken up, but also at the time of the direct appeal, not even the Ninth Circuit had the benefit of the Blakely and Booker opinions. The case stayed up in the Supreme Court for a year, before all of a sudden, it was in that rush of cases that came down to the Ninth Circuit after Booker. And, then the Ninth Circuit issued its remand in turn.

So, when the direct appeal was heard, they weren't

analyzing this Court's finding of brandishing versus possession in accordance with the Blakely and Booker decisions. They were basically in the same position you were, at the time. And, and frankly, and simply stated, things have changed.

MS. BADGER: Well, the Court -- first of all, the Court did issue a sentencing memoranda, a written sentencing memoranda where the Court stated "Because Mr. Akins brandished a firearm during the events charged in Count 3, the statutory minimum sentence on that count is seven years."

Now, this Court may not have had the benefit of Blakely and Booker when it sentenced Mr. Akins, but you

THE COURT: I know how -- I can tell you this --

MS. BADGER: Pardon me?

THE COURT: I can tell you this, Ms. Badger, that had I been aware of Blakely at the time I sentenced Mr. Atkins, and further, had the jury rejected the brandishing finding, notwithstanding my disagreement with the jury -- or maybe not, maybe I would have agreed with the jury. Maybe the jury, though I have no way of knowing, would say, oh, well, it was a preponderance of the evidence, but not beyond a reasonable doubt. Maybe that is what they thought, and therefore would agree with me.

Or maybe they thought, you know, it's -- there's not enough evidence at all even to be convinced on a probability basis. They might have thought that. I just know, I know

enough about myself to be comfortable in saying I wouldn't have imposed the brandishing.

MS. BADGER: Although --

THE COURT: Because having the jury hear it, having it being presented to the jury and the jury not adopted it, you know, I -- I wouldn't accept it.

I mean, I just -- I know that much about myself, is -- you know, now whether -- is that influenced by gee, he is doing 360 months, do I really want to give him a 384-month sentence? Is there something really important about that for the safety of the public, or for the -- I don't think so. For a 38-year-old person, or at that time, I guess, 35.

I don't -- I mean, I know what I would have done. I would have said forget it. That's what I would have done.

MS. BADGER: Your Honor, you did have the benefit of -- Harris was already decided by the time that you --

THE COURT: Not Blakely, right?

MS. BADGER: I'm sorry?

THE COURT: Not Blakely.

MS. MOORMAN: And as a matter of fact, I don't think Harris was either, in 2002.

MS. BADGER: Harris was decided --

MS. MOORMAN: In 2002.

MS. BADGER: 2002. You issued your sentencing memoranda February 4th, 2003. So --

MS. MOORMAN: The finding was made prior to that. I'm not necessarily disagreeing with you.

THE COURT: Well, when was Blakely decided?

MS. MOORMAN: Blakely was decided in 2004.

THE COURT: Yeah.

MS. BADGER: But Harris, Harris is directly on point. and that is the point that the Ninth Circuit made in Dare. Harris was the exact same circumstances where a defendant -- I can't remember in Harris whether the defendant pled guilty or was found guilty. But in any event, the issue of brandishing was contested.

The Court made a finding by a preponderance of the evidence. The defendant objected on appeal, and the Supreme Court held that the preponderance of the evidence finding, even if a jury didn't make that finding, did not violate the Sixth Amendment.

THE COURT: Let me ask you this, Ms. Badger. Harris, which you say is directly on point, --

MS. BADGER: Yes.

THE COURT: That case did or did not involve a submission to the jury of the issue of whether or not the defendant brandished a weapon?

MS. MOORMAN: It didn't. It did not, so the Record is clear.

THE COURT: That's my view. I think that is correct.

And if that's correct, I'm telling you now that's a different case than Harris. At least, I react to it differently.

MS. BADGER: Well, the fact that a jury -- I mean, this was addressed by -- on the direct appeal, and the Ninth Circuit's opinion on the direct appeal. The fact that a jury may not have found an element beyond a reasonable doubt does not prevent the Court --

THE COURT: Let me ask you this. Why is this case back here? In other words, what is there for me to consider, for goodness' sakes? What am I supposed to do? If you're right, then the Ninth Circuit's wrong.

MS. BADGER: Well, we did argue that to the Ninth Circuit.

THE COURT: Well, I don't -- but that's what I don't understand. If I am just supposed to impose, and I'm required to do so, the same sentence I gave him the last time, the Ninth Circuit's bright enough to figure that one out. I don't mean that in a facetious way.

I mean, I mean, they sent it back to me to do something. Why would they send it back to me to do something if legally I can't do it? I don't understand the argument. I mean, I'm not trying to quarrel with you, I'm just trying to figure out, what's going on?

I don't understand that. Maybe you can explain it to me. Don't have to do it right now, but I mean maybe I'll just

put it over a week, and you can think about it, and give you an opportunity to explain to me why they sent it back to me.

MS. BADGER: Well, I can't explain why -- I mean, the opinion or the memoranda sending it back was -- excuse me.

THE COURT: Well, then, you have to tell me, you have to tell me in the very least that -- well, I don't know. I don't know. I can't phone them. They thought I had to do something. They thought that I might do something differently.

MS. BADGER: The order reads, "We remand for the purpose of determining whether the sentence imposed would be materially different under Booker."

THE COURT: Okay, that, to me -- then that is their boilerplate. That to me suggests that they think I might impose a different sentence.

So let's say I say no, let's -- if I say no -- if I say yes, I would impose a different sentence, and they come back -- then I'm going invite you to take it up. Then they come back and they say you can't.

Let them do that. Let them do that. Come back and tell me I can't. And I'll say, "Fine. Why did you send it to me to begin with? I've got plenty to do."

MS. BADGER: Well, I think this -- the Court has to follow the law --

THE COURT: I'll put it over a week. I'll give you the opportunity to explain to me in a written form why you think

the Ninth Circuit sent it back to me under Ameline, and whether I have the -- whether I evinced what I'm supposed to do. That is what I'm going to do. Put you on the hot seat.

We'll put the Government -- well, you have got to explain it. Fine. If I buy your argument. Maybe I'll buy it; I don't know. But I don't understand how they can send it back to me and the Government take the position that legally you can't do anything, and it is clear you can't do anything different.

MS. BADGER: Okay.

THE COURT: Okay.

MS. BADGER: Your Honor, I'm not going to be in town next Wednesday. I don't know if you want to --

THE COURT: Two weeks. Well, I don't want to keep Mr. Atkins --

MS. MOORMAN: He's okay. He's all right where he is.

THE COURT: That is all right?

MS. MOORMAN: He doesn't object to a continuance.

THE COURT: You don't mind being --

THE DEFENDANT: (Shakes head)

THE COURT: Okay.

MS. MOORMAN: The next opportunity for me to be here on a Wednesday would be the 22nd.

THE COURT: Thank you. The 22nd.

MS. BADGER: So, we'll be here the 22nd?

THE COURT: Yeah. Just give me something to look at, at your convenience.

MS. BADGER: Okay, thank you.

THE COURT: All right. Ms. Moorman can respond. Okay? Just work out the schedule.

MS. MOORMAN: That's fine. We will.

THE COURT: Thank you very much.

MS. MOORMAN: Thank you.

(Conclusion of Proceedings)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. CR 01-0435 CRB, United States of America v. Reginald Akins, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

Belle Ball, CSR 8785, RMR, CRR

Thursday, May 18, 2006